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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

JOSEPH B. DECKER,

Petitioner,

v.

UNITED STATES OF AMERICA.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

REPLY BRIEF FOR PETITIONER.

WILLIAM D. DONNELLY,
Counsel for Petitioner.

CUMMINGS & STANLEY,
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REPLY BRIEF FOR PETITIONER.

The Government apparently recognizes the conflict between the *Stapp* case (120 F. 2d 898) and the decision of the court below, in so far as it rests on the ground stated by the court, i. e.: "Triumph was not defrauded, i. e., suffered no economic detriment until the check had been received through the mail by the Pittsburgh bank and had been charged against Triumph's account in that bank" (R. 124).

The reasoning is so plainly unsupportable, and so plainly in conflict with the decision in the *Stapp* case that the Gov-

ernment now seeks to buttress and distinguish the instant case on the ground that it comes within the well-recognized rule that use of the mails to prevent discovery of a fraud is, within the meaning of the statute, a use "for the purpose of executing such scheme."[1]

We do not question the correctness of the rule to which the Government cites (Br. Opp., p. 8).

The Government's brief in opposition is based solely upon assumed facts for which it furnishes no citations and which are without foundation in the record.

1.

The Government's argument is completely baseless because it proceeds upon an assumption of non-existent facts. There is nothing in the record to support, and it is notable that the Government altogether omits any record citation to sustain, the assertion (Br. Opp., p. 8):

> it was a most vital and important part of the scheme that the checks clear and be charged to Triumph's account with the Pittsburgh bank.

Neither does the Government cite to the record to support its reiteration (Br. Opp., p. 11).

> Until those checks had been mailed to and paid by the Peoples-Pittsburgh Trust Company, the account of Triumph had been charged with the items and all necessary vouchers, book entries, and other acts and

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[1] In other words, there is clear conflict of circuits but the Government now opposes the petition on the ground that the result below is right under another theory. Contention that a decision is correct will not, of course, defeat a writ of certiorari based upon a conflict of circuits. See Robertson & Kirkham, Jurisdiction of the Supreme Court of the United States, sec. 292, p. 564, Fns. 4-6.

> methods of concealment had been accomplished, the scheme to defraud was not consummated.[2]

It is highly significant that, although this same argument was urged in the circuit court of appeals, the opinion of Judge Dobie does not go on this ground or invoke this theory (R. 124).

So far from supporting these naked assertions of fact by the Government, the record clearly discloses that the sending of the checks to Pittsburgh in no way aided in concealing the fraudulent scheme and was in no way requisite to, or a step precedent in, the making of the concealing entries on the books of the corporation.

All of the concealment through false entries was shown to have been obtained or provided for at the time the check was issued by the Corporation. At the time the first check of the series was drawn, Miss Jackson was directed to make up an invoice or voucher to clear the charge through her account (R. 79). She made up vouchers in all instances to go through the books of the Corporation (R. 83, Tr. 134). At or shortly after the time she prepared the checks for signatures she had them "O.K'd" by Decker and gave them to Mr. Vernon, the Comptroller (Tr. 82-83). He put the charges on the books (Tr. 82-83). These vouchers are all in evidence as Govt. Exh. No. 2 (R. 85). Thus immediately the check was written she was charged through the check register with the amount of the check in an account in her name in the Accounts Payable ledger (R. 85, Tr. 132, 150-151). By virtue of the vouchers in each instance, her account in the Accounts Payable ledger was credited and a

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[2] This is a curious argument. Without directly stating, or assuming responsibility therefor, its negative form is plainly calculated to produce in the mind of the reader the inference that "vouchers, book entries, and other acts and methods of concealment," occurred subsequent to, and were consequent upon the mailing of each check.

debit was made to the Commissions or Prepaid Miscellaneous Expense account (Tr. 86-88, 139-140, 145-146).

This office accounting procedure which concealed the fraud by causing the books to falsely show that the checks issued were for commissions to Miss Jackson manifestly occurred *prior* to the mailing of the checks here in question and obviously was in no way dependent upon, and had not the slightest relation to, the forwarding of the checks to the Pittsburgh bank or to the other return of the canceled checks to the corporation.

Neither is there support in the record for any contention that had the Pittsburgh bank failed to pay any of the checks the fraud would have been discovered. This contention or inference might be acceptable had the defendants been clerks or inferior officers, but here they were in control of the corporation. It is plain that had the Pittsburgh bank failed to pay any of the checks, the defendants by virtue of their managerial control could have directed the Elkton bank to reimburse itself from deposits of the company in that bank which were at all times sufficient for that purpose (Tr. 326). Indeed, it appears that the withdrawals from the Peoples-Pittsburgh Trust Company were merely incidental to the scheme since the choice between the Pittsburgh bank and the Elkton bank as drawee was made not by the defendants, but by Mr. Vernon, the company comptroller, and Miss Jackson each time a check was written (Tr. 131). That payment or non-payment by the Pittsburgh bank was irrelevant in view of the managerial position of the defendants is also apparent from the evidence that, even after discovery of the false entries by Navy auditors, the reports of the defendants in explanation as to the use of the money were accepted without question by the Board of Directors (See Petition, pp. 6-7). It is thus apparent that there was an utter lack of evidence that payment of the checks by the Pittsburgh bank added anything to the concealment of the

fraudulent nature of the transaction. This Court may well take judicial notice of the fact that accounting entries occasioned by issuance of checks are made by a corporation not when the check clears through the drawee bank, but rather at the time the check is issued.

The record permits only of the conclusion that as to each check the scheme to defraud was consummated with the cashing of the check by the Elkton bank and the withdrawals from the Pittsburgh bank contributed in no way to prevention of discovery nor to the making of the vouchers, book entries, or doing of other acts of concealment.

The record signally fails to support the Government's assertion that there is in this case an element of concealment through mailing which was not present in the *Stapp* case.

2.

Despite the fact that the conflict upon which petitioner relies is based upon the second ground of decision in the circuit court of appeals, the Government bases its opposition to the petition, in part at least, upon the alternative ground advanced by the court below (R. 124): "Here the fraudulent scheme was clearly a continuing one." This, of course, does not obviate the conflict and hence requires no consideration now. It should be noted, however, that the argument of the Government on this point based on substantially the same supplemental theory of use of mails for concealment is not only without support in the record, but contrary to reason. The Government asserts (Br. Opp., p. 9):

> There is evidence that such a continuing scheme would not have been possible without the proper clearance of each successful check, especially in view of the fiduciary relationship existing between the defendants and victim.

There is, of course, no evidence to support this assertion and the Government cites none.[3] As shown above, the fiduciary relationship existing between the defendants and the victim not only lends no support to, but clearly vitiates, any inference that proper clearance of each check was essential to the continuing scheme. The fiduciary relationship of these defendants was that of managers and non-clearance of checks would have left them free to provide for payment directly from the funds of the company in the Elkton bank. Certainly non-clearance bore no threat to the continuance of the scheme.

Conclusion.

The Solicitor General of the United States in this Court fail to furnish a single record citation for the alleged distinguishing facts upon which he solely relies, there must manifestly arise at least a grave doubt as to the existence of those facts. Certainly the application for a writ is not lightly to be denied on his mere ipse dixit.

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[3] Discovery by the court below that this argument of the Government is without support in the record may explain the inadequacy of that part of the opinion which rests on the alternative ground of decision (R. 124): "Here the fraudulent scheme was clearly a continuing one." In voting the case, the circuit court of appeals apparently accepted the Government's argument as valid. But in writing the opinion, Judge Dobie seems to have recognized that there was no support in the record for assertion that clearance of each check was essential to the continuing scheme. For he was forced to place this alternative basis of decision on the plainly insufficient ground merely that this "scheme was clearly a continuing one" without more (R. 124). Obviously the mere contemporaneity of a continuing scheme and a use of the mails does not make such use necessarily one "for the purpose of executing such scheme." Therefore, had the record facts justified, it may reasonably be supposed that Judge Dobie would have supplied the missing element by statement that mailing of the checks for clearance aided the fraud by concealing it. His omission to do so is striking confirmation that the record facts in this case will not sustain any such assertion.

It is therefore submitted that the writ should be granted and the conflict of circuits resolved.

Respectfully,

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